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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SERGEY PEREYMA,

Plaintiff and Respondent,

v.

PATRICIA DONATO,

Defendant and Appellant.

D060610

(Super. Ct. No. 37-2009-00070768-
CU-OR-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Patricia Donato appeals from a judgment resolving a dispute among neighbors regarding obligations to pay for the improvements, repair and maintenance of a private right-of-way known as Rancho Ballena Road. Donato's sole appellate contention is that the court did not have subject matter jurisdiction over the claims because Rancho Ballena Road is owned by the United States government in trust for an Indian tribe (referred to in this opinion as the Mesa Grande Tribe). (28 U.S.C. § 1360 (§ 1360).) For the reasons

explained below, we find Donato's contention to be without merit and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY¹

Rancho Ballena Road is a private right-of-way in Ramona used by several property owners to access their homes. One of those property owners, Sergey Pereyma, incurred \$148,484.34 in costs to repair and improve the road. He did not notify any of the neighbors before contracting for the work.

After completing the work, Pereyma brought a lawsuit against several neighbors (including appellant Donato) who use the road for access to their property. Pereyma sought to compel these defendants to contribute to the cost of repairing and improving the road. Pereyma alleged he was required to perform the road work based on a San Diego County (County) building permit condition.

In his complaint, Pereyma asserted two causes of action. First, he brought a specific performance cause of action alleging that his property and defendants' properties were subject to identical County covenants requiring certain improvements to Rancho Ballena Road and that these covenants must be satisfied before the County would grant building permits or approve new development on any parcel. Pereyma alleged he completed the work satisfying the covenant, and in January 2009, the County filed a release of the covenant. Based on these allegations, Pereyma sought to recover the repair and improvement costs on a specific performance legal theory.

¹ Because the parties did not designate the reporter's transcript of the trial, we derive our factual summary from the complaint and the court's statement of decision.

Second, Pereyma brought a claim for contribution under Civil Code section 845 (section 845), which sets forth rules for allocating costs spent in maintaining and repairing a right-of-way easement that is either owned by multiple parties or attached to parcels of land under different ownership. The code section states: "[i]n the absence of an agreement, the cost [to maintain the right-of-way] shall be shared proportionately to the use made of the easement by each owner."² (§ 845, subd. (c).)

Defendants' answers to the complaint are not part of the appellate record.

After a three-day trial, the court took the matter under submission. The court then issued a statement of intended decision, finding Pereyma did not prove the specific performance cause of action and thus could not recover based on his claim seeking to enforce the County's covenant requiring the improvement/repair work. But the court

² Section 845 provides in relevant part: "(a) The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, shall maintain it in repair. [¶] (b) If the easement is owned by more than one person, or is attached to parcels of land under different ownership, the cost of maintaining it in repair shall be shared by each owner of the easement or the owners of the parcels of land, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose. If any owner who is a party to the agreement refuses to perform or fails after demand in writing to pay the owner's proportion of the cost, an action for specific performance or contribution may be brought against that owner in a court of competent jurisdiction by the other owners, either jointly or severally. [¶] (c) In the absence of an agreement, the cost shall be shared proportionately to the use made of the easement by each owner. [¶] Any owner of the easement, or any owner of land to which the easement is attached, may apply to any court where the right-of-way is located and that has jurisdiction over the amount in controversy for the appointment of an impartial arbitrator to apportion the cost. The application may be made before, during, or after performance of the maintenance work. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportionate liability of each owner. The judgment may be enforced as a money judgment by any party against any other party to the action."

found Pereyma "carried his burden of proof" on his section 845 claim. The court found that although there was no agreement among the parties to repair and maintain Rancho Ballena Road, each defendant (including Donato) benefited from Pereyma's work and Pereyma's work "was reasonable, necessary and consistent with the purpose for which [Rancho Ballena Road] was intended to be used." The court further found that under section 845, Pereyma could recover only those costs for "repair" or "maintenance" work, and could not recover costs incurred for "improvements" to the road. The court found that of the \$148,484.34 in total costs incurred by Pereyma, \$83,348.34 reflected repair or maintenance costs and \$65,000 reflected costs for improvements. After additional deductions (unrelated to the issues here), the court allocated the remaining costs among the parties based on various factors, including their use of the road. Appellant Donato's share was \$16,069.73.

Donato (and another defendant) filed objections to this statement of intended decision. Donato challenged the court's findings that the repairs were necessary and the costs were reasonably incurred for the repairs, and argued that her allocated cost share should be reduced because her use of the road was minimal. Donato also asserted that the court lacked jurisdiction over the subject matter of the dispute. In this regard, she stated: "The only evidence regarding the ownership of the land underlying the road easement came from Mr. Mallon, who testified that it was owned by the Mesa Grande Indian Tribe. That testimony was un rebutted. [¶] The court is also requested to take judicial notice of San Diego County document no. 2002-0024439, showing that the parcel is owned by the United States Government in Trust for the Mesa Grande Tribe. A

certified copy will be submitted as soon as it can be obtained. [¶] Under title 28 U.S.C. § 1360(b), state courts lack subject matter jurisdiction over disputes concerning Indian land. . . ."

After reviewing these objections, the court adhered to its prior factual and legal conclusions, and entered judgment against each of the defendants. The judgment against Donato was for \$16,069.73.

DISCUSSION

Donato's sole appellate contention is that the court did not have subject matter jurisdiction because Rancho Ballena Road is owned by the United States in trust for the Mesa Grande Tribe.³

I. Generally Applicable Legal Principles

Section 1360(a) gives certain states, including California, jurisdiction over civil disputes that involve Indians and arise on Indian lands. Section 1360(b), however, limits the scope of this jurisdiction and provides for exclusive federal jurisdiction for certain disputes. Specifically, it provides the general grant of civil jurisdiction does not "confer jurisdiction upon the State *to adjudicate*, in probate proceedings or otherwise, the *ownership or right to possession of such property or any interest therein*." (§ 1360(b),

³ Donato requests that we take judicial notice of two recorded deeds of trust, which she says support her claim that Rancho Ballena Road was owned by the United States in trust for the Mesa Grande Tribe since 2002. We grant the request. (See Evid. Code, §§ 452, subd. (c), 459, subd. (a); *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194; *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549.) For purposes of this appeal, we assume the United States government owns Rancho Ballena Road in trust for the Mesa Grande Indian Tribe.

italics added.) The "*such property*" referred to in this subsection includes "any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States." (*Ibid.*, italics added.)⁴

Courts must interpret these provisions broadly in favor of federal jurisdiction. (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1147-1151, 1153-1154 (*Boisclair*) " ' "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history." ' " (*Id.* at p. 1147; see *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340, 1347-1348.) "The protection of Indian trust land through federal legislation has been one of the principal means by which the federal government has sought to secure the economic well being and tribal autonomy of native Americans." (*Boisclair, supra*, at p. 1149.)

When a party asserts complete preemption under section 1360(b), the court must "look beyond the face of the complaint to determine from the totality of the pleadings

⁴ Section 1360 reads in relevant part: "(a) Each of the States listed in the following table [including California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . [¶] (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

whether the case before it is a *dispute* over the 'ownership or right to possession [of Indian land] or any interest therein.' If it appears from the pleading that the case may be so characterized, and that one possible outcome of the case may be a finding that the property *in dispute* is Indian trust land, the court must dismiss the case for want of subject matter jurisdiction." (*Boisclair, supra*, 51 Cal.3d at p. 1156, italics added.)

Whether a court has subject matter jurisdiction over a claim is generally a question of law requiring an independent de novo review. (See *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.) A challenge to a state court's subject matter jurisdiction can be raised at any time. (See *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 207; *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538.)

II. Analysis

Donato contends the court had no subject matter jurisdiction under section 1360(b) because the lawsuit involved or concerned improvements/repairs to Rancho Ballena Road, and when these repairs were made, Rancho Ballena Road was owned by the United States government in trust for the Mesa Grande Tribe.

Under section 1360(b)'s plain language, federal courts have exclusive jurisdiction when the court is required to "*adjudicate . . . the ownership or right to possession of*" claimed Indian land or an interest in the land. (Italics added.) "Adjudicate" means to: "make a formal judgment or decision about a problem or disputed matter"; "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised"; "to settle or determine (an issue or dispute) judicially." (Oxford Dictionaries Online

<<http://english.oxforddictionaries.com>>; Webster's 3d New Internat. Dict. (2002) p. 27); Random House Unabr. Dict. (2d ed. 1993) p. 25.)

In this case, Pereyma did not ask the court to make a decision on, determine, settle, or pass judgment on the issue of the ownership or right to possession of Rancho Ballena Road, nor did any of the defendants raise any defense requiring the resolution of any issue pertaining to the ownership or right to possession of Rancho Ballena Road. As Donato acknowledged in the proceedings below, the fact that the road was owned by the Mesa Grande Tribe was undisputed at trial and the ownership issue was not a matter in controversy in the litigation. Further, as discussed below, there was no challenge to Pereyma's use of the road or his right to repair or improve the road. The sole issue raised by the parties involved Pereyma's right to compel his neighbors to pay for the repairs and/or improvements. That issue did not require the court to "adjudicate . . . the ownership or right to possession of" Indian trust land. (§ 1360(b).)

In her appellate briefs, Donato suggests the court was required to adjudicate issues relating to the Tribe's ownership of the land because the County allegedly had no authority to enforce its covenants and require improvements to the road because of the road's status as Tribal land. However, even if *this* issue could be construed as a dispute over Indian property rights, there is no showing the issue was raised by the pleadings or at trial. Based on our review of the documents in the appellate record, it appears undisputed that the County required certain work as a condition to Pereyma obtaining a building permit. There is no indication that Donato or any of the other defendants challenged this fact or asserted a defense to Pereyma's claims based on the assertion that

the County had no legal authority to require this work. Although Donato now argues that Pereyma's repairs to Rancho Ballena Road were improper because Pereyma performed the work "without any authorization from the Tribe, Congress or the Department of the Interior," there is no showing that this was an issue raised by the pleadings or by the parties at trial.

Equally important, the trial court found Pereyma failed to prove his cause of action seeking specific performance based on the County's enforcement of the road improvement covenant, and the court awarded damages against Donato based solely on Pereyma's section 845 claim. Under section 845, a court has the authority to allocate the repair and maintenance costs of a right-of-way among property owners who use the road, even if there is no agreement among the parties and regardless of the specific motivation underlying the repairs. With respect to this section 845 claim, the court specifically found that each of the defendant property owners benefited from the repairs and that the repairs were reasonable and necessary to repair the road for its use as a right-of-way. The issue of whether the County could require the repairs was not an issue with respect to the section 845 claim, which is the only claim upon which Pereyma prevailed.

In her reply brief, Donato asserts for the first time that Pereyma had no standing to seek section 845 contribution because there was no evidence that he owned an easement in Rancho Ballena Road or had any interest in the land upon which he made the improvements and repairs. Based on this argument, Donato argues that the court was required to adjudicate issues concerning ownership interests in Indian land within the meaning of section 1360(b).

As a threshold matter, Donato waived this argument by failing to raise it in her opening brief. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

Even if we were to reach the merits, this argument does not show Pereyma's claims came within section 1360(b). Although section 845 provides for the recovery of repair/maintenance costs *by an easement owner*, neither the pleadings nor the court's statement of decision show there was any dispute over the fact that Pereyma was an owner of the easement (the Rancho Ballena Road), and there is no indication of any dispute that the defendants also used this road as a right-of-way for access to their property. Because there is no showing the court was required to *adjudicate* any issue or dispute regarding Pereyma's ownership of the easement, section 1360(b) preemption was not triggered.

In support of her legal arguments, Donato relies on *Boisclair, supra*, 51 Cal.3d 1140 and *Inland Casino Corp. v. Superior Court* (1992) 8 Cal.App.4th 770 (*Inland Casino*). She argues these decisions stand for the broad proposition that a state has no subject matter jurisdiction over a claim any time the litigation "involves or concerns" Indian trust property. These cases do not support this broad legal proposition. Moreover, they are factually distinguishable from the circumstances here.

In *Boisclair*, a mining corporation brought an action against non-Indian and Indian defendants, alleging that the defendants were preventing the corporation from using a dirt

road that runs from the corporation's mine to a public road. (*Boisclair, supra*, 51 Cal.3d at pp. 1145-1146.) Portions of the dirt road were located on Indian land. (*Id.* at p. 1145.) The mining corporation alleged that the dirt road was public or, if it was Indian land, the mining company had implied or reserved easements to use the road. (*Id.* at p. 1144.) Claiming that the disputed road was Indian trust land, the Indian defendants moved to dismiss the case for a lack of subject matter jurisdiction. (*Id.* at p. 1146.) The California Supreme Court held that section 1360(b) barred the state court from assuming subject matter jurisdiction over the claims because the case presented a "*dispute* over the 'ownership or right to possession [of property claimed to be Indian land] or any interest therein.' " (*Boisclair, supra*, at pp. 1146-1156, italics added.) The court explained that "[t]he facts alleged in the complaint . . . that the road runs through what both sides concede to be Indian land *and* that there is a factual dispute about whether the road is public . . . make it clear that the *dispute* concerns Indian property rights." (*Id.* at p. 1156, italics added.) Based on the need for the court to rule whether the Indian defendants had interests in the road, the court concluded that the portion "of the complaint *that asks for the adjudication of rights to purportedly Indian land* . . . cannot be adjudicated by a court of this state." (*Ibid.*, italics added.)

In this case, neither Pereyma's affirmative claims nor Donato's defense required the court to adjudicate a dispute that concerned Indian property rights. The dispute was whether Pereyma was entitled to require his neighbors to share the costs of repairing and maintaining a commonly used right-of-way road. The fact that the right-of-way was owned by the United States government in trust for an Indian tribe was not an issue that

required the court to adjudicate rights to ownership of the road or to an easement burdening the road. In objecting to the court's intended statement of decision, Donato raised the general issue of subject matter jurisdiction, but did not raise or mention the issues (asserted on appeal) that a party has no standing to seek section 845 contribution if the land is owned by an Indian tribe or that the County had no authority to require certain improvements to the road because it was Indian trust property, nor is there any indication from the record that these issues were ever raised in this litigation.

In finding *Boisclair* distinguishable, we recognize that *Boisclair* contains broad language stating, for example, that section 1360(b) "den[ies] to states the ability . . . to adjudicate disputes *involving* [Indian] property." (*Boisclair, supra*, 51 Cal.3d at p. 1154, italics added.) However, the language of a court's opinion must be read in context of the facts and holding of the case. (See *People v. Howard* (1997) 16 Cal.4th 1081, 1092; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) In *Boisclair*, the court focused on the pleadings showing the parties had contrary positions regarding the ownership of a road over the Indian property — the plaintiff alleged the road was a public road whereas the defendants claimed the road was part of the Indian trust land. Because the court would be required to resolve *these competing claims*, the court found the state court had no subject matter jurisdiction over these claims under section 1360(b). Specifically, the California Supreme Court explained that section 1360(b)'s "use of the broad term 'ownership' signifies that one class of disputes barred from state court jurisdiction is that in which one side claims that the disputed property is Indian land and the other side claims the contrary. This is such a case." (*Boisclair, supra*, 51 Cal.3d at p. 1153.)

Unlike *Boisclair*, the court in this case was not required to resolve competing claims regarding the ownership of Rancho Ballena Road, or disputed claims regarding an interest in the road.

Donato's reliance on *Inland Casino, supra*, 8 Cal.App.4th 770 is similarly misplaced. In *Inland Casino*, a non-Indian entity (FSE) entered into a contract with a non-Indian casino operator (Inland) for the installation of kitchen equipment for a casino located on Indian land. (*Id.* at pp. 773-774.) After FSE installed the equipment, Inland refused to pay. (*Id.* at p. 774.) FSE then filed an action against Inland asserting numerous claims, including one seeking to foreclose on a mechanic's lien. (*Ibid.*) Relying on *Boisclair*, we held the trial court had no subject matter jurisdiction over the mechanic's lien claim. We found that in asserting the mechanic's lien claim, FSE was seeking to foreclose on "the Indian realty," which plainly creates a dispute over the ownership of Indian property. (*Inland Casino*, at pp. 777-778.) We additionally found that even if the lien could be enforced on the kitchen equipment alone, under the pleadings "[t]here is a *clear dispute* whether the [kitchen] equipment is Indian trust property" and the resolution of this dispute was potentially material to the outcome of the mechanic's lien claim. (*Id.* at p. 778, italics added.)

This case is factually distinguishable. In this case, the parties did not dispute the ownership of the Rancho Ballena Road and the court's ruling on the section 845 claim did not require the court to adjudicate any dispute regarding an interest in the ownership of the road.

DISPOSITION

Judgment affirmed. Appellant to bear respondent's costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.